

## **MEMORANDUM OF SUPPORT**

### **EMERGENCY RELIEF-PRELIMINARY INJUNCTION**

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, Plaintiff Joyce Rowley is seeking a preliminary injunction to prevent further harm to Ruth, one of two elephants at the Defendant City of New Bedford's Buttonwood Park Zoo.

On October 8, 2021, Rowley filed the Endangered Species Act (ESA) action in the matter of the captive Asian elephants Ruth and Emily at the Zoo. Her Complaint cites Ruth's poor nutrition, lack of mobility and weight loss as evidence of mistreatment by the Defendant. Ruth continues to lose weight as a direct result of the Defendant City preventing her from moving, grazing and eating. Asian elephant Emily is not confined and her weight, though low, is stable and increasing.

### **I. Factual Background**

While the Defendant may attempt to blame Ruth's pododermatitis and arthritis on her "preference" to stand still for hours, it is clear that she is willing to move and graze when allowed. As recently as November 6, 2021, Ruth was seen trying to access the outer yard. She has since been confined in the "barn" and limited to the barren inner yard when outside. (Exhibit 1, Photo of Ruth trying to reach grass, dated November 6, 2021; Photo, Ruth confined to barn door, no grass or food nearby, November 9, 2021.)

Ruth's confinement over the past year, and resulting weight loss, also caused her muscles to atrophy. Her poor body condition and poor nutrition contributed to her pododermatitis and subsequent septic osteitis.

In particular, Ruth's weight, at one time ~7,000 lbs., plummeted 405 lbs. in the past year; about 15% of her body weight was lost. Of that, Ruth lost 180 lbs. in the past six months. There is no mention of this in the zoo records until after the Complaint was filed. And since this Complaint was filed last month, Ruth lost another 100 lbs. (Exhibit 2, Weights, Specimen records, received from the City of New Bedford, MA under MGL 66, Public Records Act).

In their natal subtropical habitat, Asian elephants routinely traverse a range of between 105 and 320 km<sup>2</sup>.<sup>1</sup> Asian elephants eat up to 340 lbs. of grasses, grains and browse per day<sup>2</sup>, spending 12-18 hours each day eating.<sup>3</sup> According to the zoo's records, Ruth receives only 80 - 100 lbs of hay daily and 30 lbs. of grain, and produce. Her range is an 800 square foot stall 18-20 hours each day, and less than

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<sup>1</sup> Sukamar, R., Ecology of the Asian elephant in southern India. I. Movement and habitat utilization patterns, *Journal of Tropical Ecology*, Volume 5 Issue 1, 1989.

<sup>2</sup> Samansiri, K.A.P., Weerakoon, D.K., "Feeding Behaviour of the Asian Elephant in the Northwestern Region of Sri Lanka," *Gajah*, 2:27-34 (2007)

<sup>3</sup> Sukamar, R., A brief review of the status, distribution and biology of wild Asian elephants *Elephas maximus*, *International Zoo Yearbook*, Volume 40, Issue 1 p. 1-8

10,000 square feet, even when allowed to move freely. Most days she must stand at one of the barn doors or at a wooden hut.

Primary factors for pododermatitis (hoof rot) are lack of exercise and poor nutrition. Pododermatitis, poorly managed, may lead to osteitis, when combined with standing in a moist environment on hard substrate and excrement.<sup>4</sup>

The Defendant's veterinarian ordered "stall rest" in August, unheard of for osteitis and canker, and now cellulitis (infection of the foot tissue). Ruth was forced to live 24 hours a day for over a month in the same fetid conditions that caused the infection.

Emily has been on a reduced diet for six years. However, she has been allowed to walk around the entire small half-acre exhibit, and to graze, drink and cool as needed. She is taller than Ruth and typically outweighs her by 1,500 lbs.

Currently Emily weighs 7,755 lbs. Her maximum weight was 8,566 lbs. in October 2019. Emily's weight loss was less by half than Ruth's (8% of her body weight), and, in fact, she gained 125 lbs. in September 2021, despite having pododermatitis.<sup>5</sup>

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<sup>4</sup> Mikota, S. M., Fowler, M., Biology, Medicine & Surgery & Ch. 20, Foot Disorders, Murray Fowler, p. 277 (2006)

<sup>5</sup> Records received on October 27, 2021 include previously unreported clinical notes for the period September 15-26, 2021. Emily's canker has grown and is being trimmed. Still, Emily is not restricted from moving and grazing.

## II. Legal framework

A preliminary injunction under Federal Rule 65 may be granted after determining whether it meets a four prong test: (1) it is substantially likely to succeed on the merits of its claim; (2) absent the injunction there is "a significant risk of irreparable harm"; (3) the balance of hardships weighs in the movant's favor; and (4) the injunction will not harm the public interest. (*I.P. Lund Trading v. Kohler Co.*, 163 F.3d 27, 33 (1st Cir.1998))<sup>6</sup>

The case against the Defendant is a strong one, which should succeed on the merits. Both elephants suffer from hoof rot resulting from a leaky roof the Defendant chose not to fix, and compounded by a veterinarian who intentionally ignored the advice of her peers.

Without the injunction, there is significant risk of irreparable harm. Plaintiff will be harmed by Ruth's continued mistreatment. Ruth is in danger at this zoo, and Plaintiff's only recourse is to have her removed to prevent further harm. The threat is imminent, as the Defendant is unwilling to stop Ruth's continued mistreatment.

The third test, a balancing of the parties' interests, weighs in favor of the

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<sup>6</sup> The Defendant City has budgeted funding for proposals to "privatize" the Zoo, which would include transferring Ruth and Emily to a private entity. Since this third party will have control over them, the preliminary injunction seeks to prohibit that transfer.

injunction. The Defendant loses nothing by Ruth's removal, and may save money. The cost of feeding, housing and treating an elephant is considerable--estimated at up to \$150,000 annually. Defendant has publicly stated they will not replace the elephants if they die.

Finally, Ruth's removal serves a great public interest: upholding federal laws on the treatment of endangered species, particularly with regard to the "taking" by injury.

Recent cases under the ESA have been successful in closing zoos where endangered species have been harmed, but at the cost of the very individuals those lawsuits sought to protect. In *PETA v. Tri-State Zoological Park*, only four of nine individuals survived to be rescued and approximately half of all protected species at the zoo died during the three-year litigation (*PETA v. Tri-State Zoological Park of Western Maryland, et al*, 424 F.Supp.3d 404 (2019)).

And in *Kuehl v. Sellner*, the results were similar at the Sellners' Cricket Hollow Zoo. After half of the nine endangered species individuals were rescued, about 60% of the remaining animals at the zoo were dead or gone by the time the Court ordered their rescue. (*Kuehl v. Sellner*, 887 F.3d 845 (2018)).

The public interest in protecting captive endangered species is not served when the very animals to be protected can't survive lengthy court battles.

For these reasons, Rowley requests that the preliminary injunction be

granted and that she be allowed to bring in a veterinarian and transport team to remove Ruth to a safe, clean facility with appropriate professional care.

Respectfully submitted,

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